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No. 84-450

In the Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(c) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

CENTRAL JERSEY INDUSTRIES, INC., ET AL., APPELLANTS

v.

UNITED STATES RAILWAY ASSOCIATION, ET AL.

ON APPEALS FROM THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the Special Court correctly held that, because appellants' properties had no earnings value in rail use, the market value of those properties for purposes of just compensation is determined by their liquidation value for nonrail use.

2. Whether the Special Court correctly held that the 8% per year compound interest rate prescribed in the Rail Act, which was equal to the interest rate appellants could have obtained as of the conveyance date on government obligations of appropriate duration, provides just compensation.

3. Whether the Special Court correctly held that the costs of removing a bridge, which were not caused by the Rail Act and would have been incurred in the absence of that Act, do not constitute compensable severance damages.

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MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States, the Department of Transportation, and the United States Railway Association move that the judgment of the Special Court be affirmed.

OPINIONS BELOW

The opinions of the Special Court are enumerated at J.S. 1-2.

JURISDICTION

The judgment of the Special Court (J.S. App. 863-869) was entered on July 23, 1984.[1] Notices of appeal were filed on July 30, 1984 (J.S. App. 870-883). On August 2,

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[1] In this motion we shall follow our usual format of referring to the appendix to the jurisdictional statement as "J.S. App." rather than adopting appellants' designation of the appendix as "C.A."

1984, this Court ordered (J.S. App. 899) that the appeal not be preliminarily dismissed under 45 U.S.C. 743(d), which provides for dismissal if "such an appeal would not be in the interest of an expeditious conclusion of the proceedings." See page 15 note 15, *infra*. Pursuant to an extension of time granted by the Court in its order of August 2, the jurisdictional statement was filed on September 21, 1984. The jurisdiction of this Court is invoked under 45 U.S.C. 743(d).

STATEMENT

This case involves the valuation of properties transferred to the Consolidated Rail Corporation (Conrail) and others pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.* (Rail Act). Appellants are Central Jersey Industries, Inc. (CJI), the successor in reorganization to the Central Railroad Company of New Jersey, and six affiliated companies;[2] prior to the transfer of their properties, appellants were part of a single rail system operating as the Central Railroad of New Jersey (CNJ). Appellants challenge the valuation of their transferred property by the Special Court, Regional Rail Reorganization Act (see 45 U.S.C. 719(b)), under Sections 303(c) and 306 of the Act, 45 U.S.C. 743(c) and 746. Appellants are the only transferors that have not settled their claims for compensation under the Act[3] and thus are affected by the decision below.

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[2] The six affiliated companies of CJI are Bay Shore Connecting Railroad, Central Railroad Co. of Pennsylvania, Dover and Rockaway Railroad Co., Mt. Hope Mineral Railroad Co., Wharton and Northern Railroad Co., and Communipaw Central Land Co.

The other parties to the proceedings below were (1) appellees United States, United States Department of Transportation, and United States Railway Association (the government parties or federal appellees), (2) Conrail, and (3) numerous other transferors and transferees of rail properties under the Rail Act and persons permitted to intervene; these other parties and intervenors are listed in the Appendix hereto, *infra*, 1a-5a.

[3] See J.S. 3; *CNJ Opinion*, 571 F. Supp. 1201, 1279 (J.S. App. 681). (We have followed the convention, used by the court below and

1. *Statutory background.* Section 306 of the Rail Act provides that transferors of rail property to Conrail are to be compensated with "certificates of value," issued by the United States Railway Association (USRA, see Sections 201 *et seq.*, 45 U.S.C. 711 *et seq.*) and guaranteed by the Secretary of Transportation, constituting "general obligations of the United States of America for the payment or redemption of which its full faith and credit are pledged" (§ 306(a), 45 U.S.C. 746(a)).[4] The certificates of value are to be redeemed by USRA on December 31, 1987, or such earlier date as USRA may specify, at a price equal to "the net liquidation value" of the properties conveyed to Conrail (decreased by the value of other benefits provided by the Rail Act and increased by any compensable unconstitutional erosion suffered by the transferor) plus interest at 8% per year, compounded annually, from the transfer date of April 1, 1976, to the time of redemption (§ 306(c), 45 U.S.C. 746(c)).[5]

The Rail Act creates a three-judge district court, designated as the Special Court (see § 209(b), 45 U.S.C. 719(b)), to determine the net liquidation value of the conveyed properties (as adjusted, where appropriate, for

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appellants in their jurisdictional statement, of referring to the opinions of the Special Court in this case by an abbreviated form of citation (see J.S. 1-2).)

[4] The Rail Act originally provided that the transferors were to be compensated with securities of Conrail and USRA obligations (§ 303(a) and (c), 45 U.S.C. (Supp. V 1975) 743(a) and (c)). The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 610(b), 90 Stat. 100, created the certificates of value as a medium of compensation. In 1981, in connection with the plan to sell Conrail to private interests, Congress eliminated the Conrail securities from the compensation scheme. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1167(b), 95 Stat. 686. See *Severance/Delay Damage Opinion*, 591 F. Supp. 651, 655-656 (J.S. App. 819-821).

[5] CNJ and the government parties stipulated that the components of value arising from other benefits and compensable unconstitutional erosion were zero. See J.S. 8 n.12; *Severance/Delay Damage Opinion*, 591 F. Supp. at 653 (J.S. App. 817); *Final Judgment re Central Railroad Co. of New Jersey* at 3-5 (J.S. App. 864-866).

other elements of value and interest) under Section 306(c) and to decide whether the compensation provided to the transferors was "fair and equitable" and not "more fair and equitable than is required as a constitutional minimum." § 303(c), 45 U.S.C. 743(c). The Special Court, consisting of Circuit Judges Friendly and Wisdom and District Judge Thomsen, conducted all of the valuation proceedings during the eight-year life of this litigation.

2. *The relationship of constitutional minimum value, net liquidation value, and the certificates of value.* Early in the proceedings below, all parties took the position, accepted by the Special Court, "that the fair and equitable standard of § 303(c)(1)(A) requires the 'just compensation' mandated by the Fifth Amendment, neither less nor more." *Severance/Delay Damage Opinion*, 591 F. Supp. 651, 655 (J.S. App. 819). Following extensive briefing and oral argument, see *CMV Opinion*, 445 F. Supp. 944, 999 (J.S. App. 167), the Special Court set forth certain principles to govern the determination of the transferors' rights to compensation under this coextensive standard.[6] The court held that the net liquidation value of the conveyed properties could be measured by the greater of the amounts realizable from (1) a sale to others for continued rail use, or (2) a piece-by-piece sale of the assets following cessation of operations and dismantlement. *Id.* at 1004-1011 (J.S. App. 177-190).[7] The court then explained:

> [T]he usual meaning of the Fifth Amendment's just compensation clause is that the taker must pay the market value of the property, without considering its

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[6] In addition, the court rejected challenges to the use of certificates of value, ruling that cash payment was not required by the Constitution. 445 F. Supp. at 999-1004 (J.S. App. 168-176), citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150-156 (1974).

[7] The court made clear that the term "liquidation" encompassed "all available methods of disposition" and was not limited to scrap. 445 F. Supp. at 1004 (J.S. App. 177); see also *Rail Use Opinion*, 531 F. Supp. 1191, 1213 n.23 (J.S. App. 592 n.23).

> own presence in the market. In these circumstances, that rule would value each transferred property at the higher of scrap value or its sales value to parties other than the United States.

Id. at 1016 (J.S. App. 199). Accordingly, the compensation to be awarded was to be determined by what a transferor could have done, in the absence of the Rail Act, to realize value from its properties. Unless it yielded a "manifestly unfair result," this net liquidation value would satisfy all constitutional requirements. *Id.* at 1029, 1030, 1045 (J.S. App. 226, 227-228, 258).[8]

3. *Determination of which properties could have been sold for continued rail use.* The Special Court divided the evidentiary proceedings between "the rail and nonrail use phases of the case." *Rail Use Opinion*, 531 F. Supp. at 1202 (J.S. App. 279). In the rail use phase, the court heard evidence[9] regarding sales of properties for con-

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[8] The court thus considered and reserved the transferors' claim that net liquidation value might not provide constitutionally adequate compensation. In later entering final judgment in appellants' case and approving settlements covering the other transferors, the court determined that net liquidation value satisfied the constitutional standard. See *Final Judgment re Central Railroad Co. of New Jersey* at 2, 4-6 (J.S. App. 864, 866); *e.g.*, *Order Approving Penn Central Agreement* (Dec. 5, 1980), slip op. 3-5.

[9] Throughout the proceedings, all direct evidence was submitted in written form, and all cross-examination was conducted by deposition. This procedure eliminated "what had been expected to be the need for a multitude of special masters" and permitted "as many as a half-dozen cross-examinations simultaneously." 531 F. Supp. at 1202 (J.S. App. 279). In the rail use phase of the proceedings, almost 300 witnesses testified by affidavit or deposition and, despite the intervening settlement with Penn Central, 29 volumes of briefs, plus record appendices, were filed. While not all of this evidence and argument directly addressed appellants' claims, much of it was relevant to CNJ's case in light of "the dependence of each [transferor's] prospects upon what would have become of other [transferors] in the absence of the Rail Act, as well as the substantial overlap of issues across the claims of various [transferors] * * *." *Id.* at 1204-1205 (J.S. App. 283); see also *id.* at 1205, 1294 n.178, 1367-1368 (J.S. App. 284, 624, 558-559).

tinued rail use in the absence of the Rail Act and the prices that would have been paid for those properties based upon earnings value. In addition, "certain lines would have been kept in rail use for reasons other than their earnings power * * * [at] prices based in whole or in part with reference to nonrail use or scrap value." *Id.* at 1202-1203 (J.S. App. 279).

The long procedural history of the rail use phase is recounted by the Special Court in its *Rail Use Opinion*, 531 F. Supp. at 1201-1204 (J.S. App. 277-283). In early 1981, just prior to the submission of the parties' opening briefs, settlements were reached with the largest transferor, Penn Central, and with Lehigh & Hudson River. Between oral argument in June 1981 and the Special Court's announcement of its findings and conclusions in the rail use phase, settlements with the Reading Company, Erie Lackawanna, and several other transferors were also achieved.

In its *Rail Use Opinion* of November 24, 1981, the Special Court accepted virtually all of the transferors' claims regarding the lines that would have been sold for continued rail use. See 531 F. Supp. at 1212, 1346, 1364, 1379 (J.S. App. 296, 524, 554, 578-579). But the court held that competition among prospective buyers would have been necessary to raise the ultimate purchase price above scrap values. "[I]n the single-buyer situation the seller would not receive much over * * * what the buyer would have perceived the seller's likely receipts from dismantling or condemnation to be." *Id.* at 1220 (J.S. App. 310). Thus, when public bodies acquired rail lines for continued use because of their value to the public rather than their capacity to generate earnings, "the prices * * * [they] would have been willing to pay * * * would have been negotiated with reference to the value of [a transferor's] next best alternative." *Id.* at 1324 (J.S. App. 488).

CNJ did not claim that any of its rail lines had earnings value and thus that, under general principles, it could have sold them for continued rail use based on earnings. However, it did contend that, prior to the de-

cisions upholding the constitutionality of the Rail Act,[10] the State of New Jersey had in fact been "on the verge of buying CNJ's entire system," *Rail Use Opinion*, 531 F. Supp. at 1378 (J.S. App. 577), at a price that allegedly had been negotiated in July 1974 on the basis of certain valuation studies. *Id.* at 1209, 1374 (J.S. App. 291-292, 570). The Special Court rejected this argument on the facts (see *id.* at 1375 (J.S. App. 571)), finding that the "substantial uncertainty as to the sale price and properties to be included in the transaction" (*id.* at 1378 (J.S. App. 576)) precluded any determination that the court decisions upholding the constitutionality of the Rail Act cut off "an actual, probable sales opportunity." *Id.* at 1375 (J.S. App. 571).

The Special Court also considered CNJ's alternative argument that, apart from these actual negotiations, the State would not have been willing, in the absence of the Rail Act, to permit CNJ's lines to go out of service. The court agreed with this contention, concluding that "[i]n the absence of any prospect of private acquisition * * * it [was] likely that New Jersey would have intervened to save CNJ's * * * rail properties for continued rail use." *Rail Use Opinion*, 531 F. Supp. at 1379 (J.S. App. 578). Because there would have been no competitive bidding, however, the sale "would have taken place at a price equal to what we have called X" (*id.* at 1382 (J.S. App. 584)), which represented the scrap or nonrail use value of the lines to be determined in the second phase of the proceedings. See *id.* at 1213 (J.S. App. 298).

4. *Determination of the amount of scrap or nonrail use values.* In the next phase of the proceedings, the Special Court turned to consideration of scrap or nonrail use values that would have set the purchase price for the sale of CNJ's and other transferors' lines in the absence of the Rail Act. Shortly after the submission of the parties' written direct evidence on nonrail use values,

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[10] *In re Penn Central Transp. Co.*, 384 F. Supp. 895 (Sp. Ct. R.R.R.A. 1974)); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

settlements in principle were reached with two major transferors, Lehigh Valley and Ann Arbor, leaving only appellants and a related entity, the Lehigh & New England Railway Co., to litigate the remaining issues.[11]

In its *CNJ Opinion* of July 12, 1983, the Special Court considered and rejected, on the facts presented, CNJ's theory that, but for the Rail Act, the State of New Jersey would have offered a purchase price in the fall of 1974 based on the valuation studies cited by CNJ. 571 F. Supp. at 1284 (J.S. App. 689-690). Among other matters, the court noted the "wide disparity" between the values one of the studies had placed on certain parcels of real estate retained by CNJ and the prices actually paid by the State of New Jersey when it acquired those same properties (independently of the Rail Act) after 1976. *Ibid.*

The Special Court then made detailed findings as to the manner in which the State, as the likely purchaser of CNJ's lines in the absence of the Rail Act, would have determined the nonrail use value of appellants' conveyed properties.[12] The parties were able to agree upon the required calculations of those values, following the principles set forth by the court in the *CNJ Opinion*, for all but a few assets. The Special Court resolved these remaining differences in December 1983 in its *Memorandum Accompanying Judgment Under § 306(c)(4) of the Rail*

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[11] The Special Court noted that "[e]ven with the scope of the proceeding thus reduced, a formidable record has been compiled. The statements of witnesses and appendices for the CNJ and L&NE comprise 5154 pages; those for the [government parties] 3368; and 17,435 pages of depositions were taken. The [government parties'] opening and reply briefs contain 786 pages; the CNJ's and L&NE's 741." *CNJ Opinion*, 571 F. Supp. at 1279 (J.S. App. 681).

[12] Following the Special Court's *Opinion on Petitions for Reconsideration of CNJ Opinion* in September 1983, 571 F. Supp. at 1335 (J.S. App. 792), which contained minor modifications of the court's findings with regard to nonrail use value, an agreement in principle was reached to settle the claims of Lehigh & New England Railway Co. Thus, only appellants' claims to compensation for properties conveyed under the Rail Act remained unsettled.

Act (J.S. App. 807), in which it found that the net liquidation value of all of appellants' covered rail properties as of April 1, 1976, was $42,509,299. The court established procedures for allocating this total amount among the seven appellants, and that matter was resolved without substantial objection. The court then turned to appellants' remaining contentions that (1) the amount of interest provided by the Rail Act was constitutionally inadequate, and (2) USRA's decision not to convey the Newark Bay Bridge under the Rail Act caused CNJ to suffer severance damages.

5. *Interest for the delay between conveyance and redemption of the certificates of value.* The 1976 amendments to the Rail Act, which created the certificates of value as a medium of payment, specified that the certificates would include interest at a rate of 8% per annum, compounded annually, from the date of conveyance to the date of redemption. § 306(c), 45 U.S.C. 746(c). As of June 30, 1984, interest under the statute totaled approximately $37.5 million (see J.S. 8 n.12). CNJ conceded that the statutory rate of interest was constitutionally "adequate" in 1976. Nevertheless CNJ claimed a constitutional right to additional compensation based upon unforeseen increases in interest rates that occurred after that time. See *Severance/Delay Damage Opinion*, 591 F. Supp. at 656 (J.S. App. 821).

The Special Court rejected appellants' claim and upheld the constitutionality of the interest provision in the Rail Act. First, the court concluded that the proper benchmark was the rate for " 'that type of marketable public debt security which constitutes a direct obligation of the United States Treasury having a duration approximat[ing] the period during which the deficiency was unpaid,' " which "is exactly what Congress" provided in connection with the certificates of value. *Severance/Delay Damage Opinion*, 591 F. Supp. at 657 (J.S. App. 824), quoting *United States* v. *Blankinship*, 543 F.2d 1272, 1276 (9th Cir. 1976). The court also pointed out the inherent difficulties of accepting appellants' contention

that the actual interest rates that occurred during the period should be used:

> [R]esort to *any* varying long-term bond yields to measure "delay compensation" is subject to a * * * fundamental criticism if, as here, such yields climb from period to period. This is that it would have been impossible for CNJ to shift from year to year from long term bonds with lower to higher rates as bond yields increased without incurring substantial capital losses.
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> * * * * *
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> [Conversely, a]ny computation on the basis of yields available on short-term Government obligations would have to take into account the transaction costs on frequent roll-overs.

Severance/Delay Damage Opinion, 591 F. Supp. at 659-660 n.7 (J.S. App. 827-828, 857 n.7) (emphasis in original). In addition, the court noted that the decisions primarily relied on by CNJ had allowed only simple interest rather than the compound interest provided in the Rail Act. *Id.* at 660 (J.S. App. 828-829).

Finally, the court reviewed "the unique circumstances of this case" and declined to "set aside the carefully considered determination of Congress, conceded by CNJ to have been reasonable at the time, that interest of 8% compounded annually constituted just compensation for the delay necessarily incident to the computation of the [value] of the railroads' properties." *Severance/Delay Damage Opinion*, 591 F. Supp. at 660 (J.S. App. 829). As the court explained (*id.* at 661 (J.S. App. 830)):

> [W]hen delay compensation is an integral part of a broad Congressional plan to preserve essential railroad service in the Northeast and to enable the bankrupt railroads in that region to receive billions of dollars from the Federal Treasury in compensation for properties whose operations were grinding to a halt, we are [not] bound to treat the decision of Congress as if it did not exist. The decision was rational not only in the sense that 8% compound interest on a government obligation with a maturity

> of eleven years and eight months was fair, as it concededly was, but in the broader sense that CNJ has adduced no evidence that anyone was then aware that interest rates would climb precipitously. Moreover, the decision clearly was a considered one. Congress did not adopt the time-honored 6% simple interest provision of the Declaration of Taking Act, 40 U.S.C. § 258a; instead it provided a much more generous 8% compound interest rate.

Furthermore, "[t]his is not the ordinary case where government, for a public purpose, deprives a citizen of property which he would have preferred to keep for his own use. Continued operation was the last thing the railroads wanted; it was something they had neither the desire nor the ability to perform. * * * Congress made numerous provisions in the Rail Act * * * granting financial aid to enable the railroads to keep alive between the date of enactment, January 2, 1974, and the date of conveyance, which turned out to be April 1, 1976." *Id.* at 662 (J.S. App. 831). Accordingly, while it recognized that the determination of just compensation is a judicial function (*id.* at 661 (J.S. App. 829-830)) and that a statutory rate of interest does not necessarily satisfy the constitutional standard in all instances (*id.* at 662 (J.S. App. 831)), the court sustained the provision for 8% interest "as part of * * * a comprehensive scheme * * * [in] a unique piece of legislation designed to cope with a national emergency of unparalleled magnitude." *Id.* at 663 (J.S. App. 832).

6. *Responsibility for the costs of removing the Newark Bay Bridge.* In 1972, the United States Coast Guard found that CNJ's Newark Bay Bridge, a structure some 1.4 miles long between Elizabethport and Bayonne, New Jersey, was an unreasonable obstruction to navigation. Rail service continued over the Bridge while the Coast Guard attempted to work out an arrangement with CNJ for the alteration or removal of the Bridge. *Severance/Delay Damage Opinion*, 591 F. Supp. at 665-668 (J.S. App. 836-841). In 1976, when the majority of appellants' properties were conveyed under the Rail Act, the Bridge was left with the CNJ estate (*id.* at 663-664 (J.S. App.

833)), but Conrail was granted an easement to use the Bridge for so long as passenger service continued across the Bridge. Conrail provided such service pursuant to a subsidy arrangement with the State of New Jersey until mid-1978, when the State terminated its subsidy; at that point the Conrail easement lapsed. *Id.* at 668 (J.S. App. 841). The Coast Guard then ordered that the Bridge be removed under Section 4 of the Bridge Act of 1906, 33 U.S.C. 494. *Severance/Delay Damage Opinion*, 591 F. Supp. at 668 (J.S. App. 842).[13] Because the Bridge was no longer being used in connection with rail service, CNJ was required to pay the cost of removal.[14]

The Special Court rejected CNJ's claim that the cost of removing the Bridge, estimated at $14 million, constituted severance damages for which compensation is required under the Fifth Amendment. It held that CNJ's claim "does not fall comfortably * * * within the traditional concept of severance damage" (*Severance/Delay Damage*

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[13] Section 4 of the Bridge Act of 1906 provides in pertinent part:

> No bridge erected or maintained under the provisions of [this Act] * * * shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and * * * the Secretary of Transportation, after giving the parties interested reasonable opportunity to be heard, [may require the bridge owner] to so alter the [bridge] as to render navigation through or under it reasonably free, easy, and unobstructed * * *. [A]ll such obstructions shall be removed at the expense of the persons owning or operating [the] bridge.

In *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907), this Court held that enforcement of the duty of a bridge owner to pay to eliminate an unreasonable obstruction to navigation, pursuant to the Secretary of War's order under Section 18 of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. 502), is not a taking within the meaning of the Fifth Amendment.

[14] In 1940, Congress enacted the Truman-Hobbs Act, 33 U.S.C. 511 *et seq.*, which apportions the cost of alteration or removal between the government and the bridge owner according to "the direct and special benefits which will accrue to the bridge owner as a result of the alteration." § 6, 33 U.S.C. 516. However, the Truman-Hobbs Act does not apply when a bridge has been taken out of rail operation. § 1, 33 U.S.C. 511.

Opinion, 591 F. Supp. at 669-670 (J.S. App. 844-845)) because the Rail Act conveyances were unrelated to CNJ's liability for the costs of removing the Bridge. Rather, it was the cessation of rail service on the Bridge that caused CNJ to incur those costs under the Bridge Act of 1906. The court noted that the conveyance of the adjacent tracks did not prevent the use of the Bridge for rail service, and indeed service continued over the Bridge for more than two years pursuant to a subsidy arrangement with the State of New Jersey. *Id.* at 669 (J.S. App. 844). Moreover, "[t]he Bridge had long ceased to have value for rail use" (*ibid.*), and "CNJ was unable to continue operation over the Bridge without state subsidy." *Id.* at 670 (J.S. App. 845). Thus, CNJ was required to bear the costs of removal because of economic circumstances and the State's termination of its subsidy, not because of the conveyance under the Rail Act.

After extensively reviewing the evidence, the Special Court also rejected the factual arguments advanced by CNJ to demonstrate that it would have avoided the removal costs in the absence of the Rail Act. First, the court stated that CNJ's failure to reach an agreement on removing the Bridge at a time when the government would have shared in the costs did not give rise to compensation because it did not result "from any taking or failure to take under the Rail Act" (*Severance/Delay Damage Opinion*, 591 F. Supp. at 670 (J.S. App. 845)) and because in any event the "responsibility for delay rests rather more in CNJ than in the Coast Guard. * * * [W]hether through necessity, obstinancy, or as a bargaining tactic, CNJ refused to accept responsibility for any part of the cost and even insisted on being paid millions of dollars for abandoning a patently worthless property." *Ibid.* (J.S. App. 845-846). Second, the court found that CNJ had "not established * * * on the facts" (*ibid.* (J.S. App. 846)) that absent the Rail Act the Port Authority of New York and New Jersey would have purchased the Bridge and paid the removal costs, and thus it was "altogether too speculative" (*id.* at 672 (J.S. App.

849)) to allow CNJ to recover on that basis. Third, although concluding that the State of New Jersey would have preserved rail service over CNJ's lines in the absence of the Rail Act, the court found that the State "'would not have had any interest in, and would not have bought the Newark Bay Bridge'" (*ibid.* (J.S. App. 850) (citation omitted)); in the alternative, the court further determined that, even if the State had bought the Bridge as part of an acquisition of the other CNJ properties, the overall purchase price would have been reduced to reflect "the benefit [the State] was thereby conferring by relieving CNJ of the burden of removing the Bridge at its own expense—a burden which CNJ would otherwise have been unable to unload." *Id.* at 673 (J.S. App. 851).

For these reasons, the Special Court concluded that the Bridge problem, which had "been with CNJ for years," did not represent a "sufficient basis, as a matter of fairness, let alone as a matter of constitutional requirement, for shifting to the United States the cost of removing a hindrance to navigation which was on the brink of becoming useless for rail service when the discussions leading to enactment of the Rail Act began." *Severance/Delay Damage Opinion*, 591 F. Supp. at 675 (J.S. App. 854).

ARGUMENT

The Special Court, based on its intimate familiarity with the extensive and complex proceedings below, correctly disposed of appellants' arguments in a series of thorough opinions upon which we rely. Although the court accepted many of appellants' legal contentions, it rejected their claims for additional compensation largely on the basis of the factual record. Moreover, most of the issues appellants raise are confined to the specific situation presented in this case.

In addition, as the only parties that have not settled their Rail Act claims (see page 2, *supra*), appellants stand alone in being affected by the judgment below. Under established principles, a summary affirmance is "an affirmance of the judgment only * * * and * * * leave[s]

undisturbed the judgment appealed from," but it does not adopt " 'the reasoning by which [the judgment] was reached' * * * [and] should not be understood as breaking new ground." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (citation omitted); see also, *e.g.*, *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U.S. 173, 182-183 (1979). Accordingly, summary affirmance of the Special Court's judgment would have no broader consequence than to reject appellants' individual claims for a larger award.

In these circumstances, we submit that the Court should summarily affirm the judgment below and thereby bring to a conclusion this unique and nearly decade-old litigation.[15]

1. Appellants do not dispute the settled principle that just compensation generally means fair market value. See, *e.g.*, *Kirby Forest Industries, Inc.* v. *United States*, No. 82-1994 (May 21, 1984), slip op. 8; *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973); *United States* v. *Miller*, 317 U.S. 369, 374 (1943). The Special Court correctly applied this standard, under the Constitution and the Rail Act, to the complicated facts of this case and determined the market

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[15] Section 303(d) of the Rail Act (45 U.S.C. 743(d)) provides that a "finding or determination" of the Special Court under Sections 303(c) or 306 (45 U.S.C. 743(c), 746) "may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28." In addition, apparently because appeals are authorized from interlocutory as well as final decisions, Section 303(d) further provides that "[t]he Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings." The government did not contend that this appeal should be dismissed under the seven-day provision, and by order dated August 2, 1984, the Court directed that the appeal not be dismissed at the outset. That order, however, does not pre-determine the substantiality of the appeal or render it inappropriate for the Court summarily to affirm the judgment below in accordance with its customary practice under direct appeal statutes.

value of appellants' properties in the absence of the Rail Act.[16] Simply put, appellants, having opposed enactment of the Rail Act (see J.S. 18), now complain that they are dissatisfied with the fair market value found by the Special Court and believe that they are owed a larger award as a matter of fundamental fairness (*ibid.*).

The Special Court determined fair market value on the basis of what a buyer would have paid at the time for the conveyed properties; as the court summarized, transferors "are entitled to compensation for the properties conveyed by them * * * for whatever they could have realized for them in the absence of the Rail Act." *Rail Use Opinion*, 531 F. Supp. at 1210 (J.S. App. 293). In this case, the only potential buyer was the State of New Jersey. Moreover, under established principles, the price that the State would have been willing to pay would have been set by appellants' next best alternative use for the property—here, in the absence of any other purchasers, the liquidation or scrapping of the lines.[17] Thus, the

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[16] As described above (see page 5 & note 8, *supra*), the Special Court recognized that a different standard might apply if fair market value yielded a manifestly unfair result. It found, however, that the market value of $42.5 million for appellants' conveyed properties was not unfair, and appellants have made no showing to the contrary. The cases cited by appellants (J.S. 22 n.28), which apply the principle of manifest unfairness, do not hold that market value based upon liquidation is necessarily inadequate under the Constitution. The Special Court considered and correctly rejected the relevance of those decisions to the instant case. See *CMV Opinion*, 445 F. Supp. at 1017-1027 (J.S. App. 203-222).

[17] CNJ never seriously contended that its properties had a market value based on earnings power or that a private party would have purchased them in the absence of the Rail Act. See *Rail Use Opinion*, 531 F. Supp. at 1209, 1374-1375, 1380 (J.S. App. 291, 570-571, 579-580). Its belated assertion that it was "a rail system committed to remaining in business with alternatives it wished to pursue" (J.S. 20 n.27) incorrectly focuses on its subjective intentions rather than on objective market considerations, and in any event it rings hollow in light of the government's early concession that the standard of fair market value included all transferors' "right to use their properties for a profit." *CMV Opinion*, 445

Special Court correctly determined fair market value by reference to the amount "that could be obtained by sale for the next most valuable use, namely, a break-up of the railroad and a sale of its component parts." *CNJ Opinion*, 571 F. Supp. at 1279 (J.S. App. 680); see also, *e.g.*, *Rail Use Opinion*, 531 F. Supp. at 1215, 1324, 1325 (J.S. App. 300, 488, 489-490); *Severance/Delay Damage Opinion*, 591 F. Supp. at 673 (J.S. App. 851).[18]

F. Supp. at 1011 (J.S. App. 190). As the Special Court found, CNJ's only alternative to shutdown was a sale of its properties to the State of New Jersey at nonrail use values. See *Rail Use Opinion*, 531 F. Supp. at 1215, 1324, 1325, 1379, 1382 (J.S. App. 300, 488, 489-490, 578, 584); *CNJ Opinion*, 571 F. Supp. at 1279 (J.S. App. 680); *Severance/Delay Damage Opinion*, 591 F. Supp. at 673 (J.S. App. 851).

Moreover, the Special Court found that " 'the financial constraints on public bodies would have reinforced their determination to pay no more than the minimum for any lines.' " *Rail Use Opinion*, 531 F. Supp. at 1320 (J.S. App. 481) (citation omitted). As the court explained (*id.* at 1334-1335 (J.S. App. 505)):

> The * * * desire [by the State to keep the purchase price to a minimum] would have been particularly acute given the large amounts at stake, the financial difficulties facing state governments at that time, and the publicity that would have accompanied any such transaction. * * * [And] the public bodies would have had a strong upper hand * * * result[ing in] successful negotiations * * *.

[18] There is no basis for appellants' sweeping and novel assertion (J.S. 19) that "the scrap value of an operating rail system taken for continued rail use can never provide just compensation." Indeed, in *Chicago & Northwestern Transp. Co.* v. *United States*, 678 F.2d 665 (7th Cir. 1982), the court of appeals expressly agreed with the Special Court that "salvage value" satisfied the constitutional requirement of just compensation for an unprofitable rail line. Rejecting the position asserted by appellants here, the Seventh Circuit stated that "we think it irrelevant whether private property is taken for a new use or to continue an old one, and even question whether this is a meaningful distinction" (*id.* at 669). Compare J.S. 22.

Furthermore, appellants' reliance (J.S. 19-20) on *Denver* v. *Denver Union Water Co.*, 246 U.S. 178 (1918), is misplaced. That case involved the determination of rates for water service to the City of Denver. The City argued that the water company engaged

Appellants' main complaint (J.S. 23) is that the Special Court should have been bound by the value of the conveyed properties that was shown in various studies prepared or considered in connection with negotiations between CNJ and the State. However, the court extensively reviewed the negotiations and the studies and concluded from the record that the State would not have purchased the properties on that basis. See *Rail Use Opinion*, 531 F. Supp. at 1375-1378 (J.S. App. 571-577); *CNJ Opinion*, 571 F. Supp. at 1279-1284 (J.S. App. 681-690). As the court summarized the evidence of the negotiations (531 F. Supp. at 1377-1378 (J.S. App. 576-577)):

> [No] one * * * in State government was ready to make any final decision on the matter. Although [Commissioner of Transportation] Sagner apparently

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in business "merely at sufferance" and that, because the City could terminate the company and build its own water system, the company should be valued at "'junk value'" in setting rates (*id.* at 184). The Court rejected this argument, finding that the company held a franchise from the City and thus "that in considering the effect of the provisions limiting rates the plant must be valued not as 'junk' but as property useful and in use in the public service" (*id.* at 186). As the court explained in the passage cited by appellants (*id.* at 190-191):

> In this situation, there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its "junk value."

Here, in contrast to the situation in *Denver Union Water Co.*, appellants would not have been able to continue to provide rail service in the absence of the Rail Act. The question in this case is not a fair rate of return for services provided, as in *Denver Union Water Co.*, but rather just compensation for a transfer of property that had no capacity to generate earnings. In answering that question, the Special Court correctly determined the market value of the conveyed properties on the basis of what appellants could have realized by selling those properties for their most valuable alternative use—a sale at nonrail use values.

> had Governor Byrne's authority to "explore" the possibility of a purchase, there is no suggestion that he was ever authorized to close a deal, or even to make a tentative proposal. Nor is there any evidence that Sagner or his staff had drawn up any particular plans for acquisition or operation of the railroad. * * * Sagner never presented any definite proposal to buy CNJ to the Governor * * * or any of the * * * [federal or state] agencies that one would expect to participate in such a decision. Moreover, there was no consensus, either within Sagner's department or between Sagner and the various CNJ parties, as to an appropriate price.
>
> The existence of substantial uncertainty as to the sale price and properties to be included in the transaction casts further doubt on CNJ's claim that an agreement had nearly been reached. * * *
>
> In short, although the record suggests that Sagner pursued and probably favored a State purchase, it does not bear out the allegation that New Jersey was on the verge of buying CNJ's entire system. On the contrary, we cannot conclude with any confidence that any State purchase would have occurred at all. There are simply too many unknowns, too many decisions not yet made, too many important actors still absent from the stage, to permit that.

Appellants' reiteration of its view of the case does not undermine the Special Court's findings, which are amply supported in the record, or indicate any reason for this Court to revisit such fact-bound questions.[19]

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[19] Contrary to appellants' assertion (see J.S. 11, 14, 23-24), the Special Court was fully cognizant of and allowed for the difficulties of proof involved in determining fair market value. See *CMV Opinion*, 445 F. Supp. at 1029, 1030, 1045 (J.S. App. 226, 227, 258); *Rail Use Opinion*, 531 F. Supp. at 1214-1215 (J.S. App. 300).

Appellants' equivocal reliance (J.S. 25) on *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973), is misplaced. *Almota* recognizes that the condemnation itself must not affect the just compensation that is due for the property taken and that the possibility of continued use of the property (absent the condemnation) should be considered in determining its value. The Special Court observed these principles by valuing CNJ's line in light of

Finally, the specific elements in the Special Court's nonrail use value findings about which CNJ complains—deductions for dismantlement, selling costs, and defective title, taking account of the effect of additional supply in the market, and discounting future proceeds to present value—are simply necessary aspects of determining realizable market values. These elements are found in many of the scrap value studies that are, as CNJ admits, "not an uncommon exercise in the railroad business" (J.S. 21). Indeed, each of these aspects was involved in the studies of liquidation value made in the *New Haven Inclusion Cases*, 399 U.S. 392, 436 (1970), where, as here, "asset value rather than earning power was the primary determinant because New Haven had 'long been dry of earning power'" (citation omitted).[20]

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the market conditions that would have existed in the absence of the Rail Act, including the abandonment and dismantlement of other rail lines that would not have been continued in rail use. In particular, the Special Court rejected CNJ's factual argument, which was the predicate for most of its legal contentions, that it would have been the first transferor to seek abandonment in the absence of the Rail Act and therefore it was entitled to preferential treatment in valuing its assets. See *Rail Use Opinion*, 531 F. Supp. at 1379-1381 (J.S. App. 579-581).

[20] Appellants' charge that the Special Court decided the case on the basis of "a preconceived view" (J.S. 26) ignores the obvious care that the court devoted to the issues and the substantial grounds —both legal and factual—that support its disposition. In addition, CJI itself presented the following table to the court overseeing its reorganization to show that, by litigating rather than settling this case, it fared better than transferors that settled (as measured in terms of the ratio between the amount of the recovery and USRA's original calculation of net liquidation value (NLV) in the final system plan (FSP)):

Transferor Estate	Date of Settlement	NLV as Settled	FSP Valuation	Percentage of FSP
Penn Central	12/4/80	$1,460,674,040	$494,967,000	295%
Reading	9/2/81	87,582,602	32,054,000	273%
Erie Lackawanna	12/25/82	229,007,090	60,297,000	379%

[Continued]

2. Appellants do not seriously dispute that the statutory certificates of value, redeemable in cash on or before a date certain and backed by the full faith and credit of the United States, could constitutionally be used as the medium of value.[21] See *CMV Opinion*, 445 F. Supp. at 999-1004 (J.S. App. 168-176), citing, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 155 (1974).[22] Rather, they argue (J.S. 15, 27) that the statutory interest rate of 8% per annum, compounded annually—although conceded to have been fully adequate at the time of the conveyances (see *Severance/Delay Damage Opinion*, 591 F. Supp. at 656 (J.S. App. 821))—in fact failed to keep pace with actual inflation and therefore is insuffi-

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[20] [Continued]

Transferor Estate	Date of Settlement	NLV as Settled	FSP Valuation	Percentage of FSP
Lehigh Valley	4/30/82	46,986,061	19,366,000	242%
Unsettled claims of CNJ and its affiliated companies		42,509,299	9,222,476	461%

See CJI Petition for Supplemental Proceedings, at 19, *In re Central R.R. of N.J.*, Civ. No. B401-67 (Bankr. D.N.J. June 25, 1984).

[21] It is well settled that "the Fifth Amendment does not forbid the Government to take [property] and pay for it later." *Kirby Forest Industries, Inc.* v. *United States*, No. 82-1994 (May 21, 1984), slip op. 8-9; see also *id.* at 2-3. The use of certificates of value under the Rail Act simply has the effect of postponing the date of payment of just compensation until after the conveyance has occurred. Provided that the rate of interest on the deferred payment is adequate (which is discussed below), there can be no substantial constitutional question about Congress's decision to employ certificates of value as the medium of compensation.

[22] Appellants also do not controvert the Special Court's finding that the specified date of December 31, 1987, as the outside time for redemption, was a reasonable estimate of the period necessary to resolve the issues of just compensation. *Severance/Delay Damage Opinion*, 591 F. Supp. at 660-661 n.8 (J.S. App. 857-858 n.8).

cient to provide just compensation.[23] Appellants' challenge to the constitutionality of the Act of Congress is unavailing and does not call for plenary review in this case.

It is common ground that interest is constitutionally required in view of the delay between the date of conveyance under the Rail Act and the date of redemption of the certificates of value. As the Court has recently stated, "if disbursement of [a condemnation] award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Industries, Inc.* v. *United States*, slip op. 9. Interest is designed to "produce the full equivalent of * * * value paid contemporaneously with the taking." *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923).

The rate of interest provided in the Rail Act satisfies this constitutional standard. By definition, a reasonably prudent investor would have been indifferent between the payment of compensation on the date of conveyance and a deferred payment by the government that accrued interest at the prevailing rate of 8% per year; that is the very meaning of appellants' concession and the Special Court's finding that 8% compound interest was reasonable in 1976 because it reflected the return existing as of the conveyance date for government securities of an appropriate maturity. See *Severance/Delay Damage Opinion*, 591 F. Supp. at 656 (J.S. App. 821). In economic terms, an immediate condemnation award by the government and a delayed award earning the then-market rate of 8% interest are fully equivalent. Cf. *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131 (June 15, 1983), slip op. 16, 18. Accordingly, the Rail Act provides compensation, including interest, that has the same economic value as a transferor would have received if payment had been made on the date of the conveyance. Appellants are in the

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[23] By June 30, 1984, approximately $37.5 million in interest had accrued under the statute (see J.S. 8 n.12).

same position they would have been in if they had been paid in cash for the conveyed properties in April 1976 and had invested the award in government bonds that matured in 1987.[24]

To be sure, the actual rate of inflation that might occur subsequent to the conveyance could have been—and, in this case, in fact was—higher than was anticipated at the time. But the possibility or "risk" of higher inflation was already built into the market figure for government securities; if that were not true, investors would have been unwilling to purchase government securities at the market rate insofar as that rate was believed to underestimate the prospect of future inflation, and thus the market rate would have increased to come into line with projected inflation. Cf. *Jones & Laughlin Steel Corp.* v. *Pfeifer*, slip op. 15. By providing interest at the appropriate market rate, therefore, the Rail Act offered transferors the full economic equivalent of the immediate payment of just compensation.

Moreover, as the Special Court noted (*Severance/Delay Damage Opinion*, 591 F. Supp. at 663 (J.S. App. 832)), appellants "would hardly have agreed" to give back a portion of their award if inflation had turned out to be lower than expected and consequently 8% interest proved unduly generous. However, the Just Compensation Clause is not, as appellants argue, a one-way street; just compensation must be " 'just' both to an owner whose property is taken and to the public that must pay the bill." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). In effect, appellants seek to require the government to insure them against the effects of unexpected changes in interest rates; but the Constitution does

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[24] Appellants recognize (J.S. 27) that it is "well settled that the rates of return on investments in conservative debt instruments available in the marketplace during the period of delay is an appropriate measure of the delay damages." See also *Jones & Laughlin Steel Corp.* v. *Pfeifer*, slip op. 13-14 (discount rate "should be based on the rate of interest that would be earned on 'the best and safest investments' " and "should not reflect the market's premium for investors who are willing to accept some risk of default").

not, in the guise of just compensation, entitle them to be held harmless from such possibilities. Contrary to established principles, the result advocated by appellants would put them, not in the same position, but in a better position, than if they had received their compensation award contemporaneously with the conveyance of their property. See *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. at 478.

Nor is it clear that appellants in fact would have obtained more than 8% interest if they had been paid their compensation award in April 1976 and invested the proceeds on their own. As the Special Court observed, if appellants had made long-term investments, "it would have been impossible for [them] to shift from year to year from long term bonds with lower to higher rates as bond yields increased without incurring substantial capital losses." *Severance/Delay Damage Opinion*, 591 F. Supp. at 659 (J.S. App. 827-828). On the other hand, short-term investments would have resulted in substantial "transaction costs on frequent rollovers" (*id.* at 660 n.7 (J.S. App. 857 n.7)) and exposed appellants to the risk that interest rates would decline rather than increase at any given point. Viewed from the perspective of the conveyance date in April 1976—which is the relevant perspective for condemnation purposes—it was equally likely that any investment strategy would do worse instead of better than the 8% interest provided in the Rail Act. The fair market equivalent of cash in April 1976 was the rate of interest on a risk-free government bond with an appropriate maturity date—and that is precisely what appellants were given.

Appellants rely on decisions holding rates of interest provided in other statutes to be insufficient. We do not generally dispute either the result in those cases or the proposition, as the Special Court recognized (*Severance/Delay Damage Opinion*, 591 F. Supp. at 661 (J.S. App. 829-830)), that the determination of a constitutionally adequate interest rate is ultimately a judicial function; indeed, the United States has acquiesced in a number of these decisions. See *Kirby Forest Industries, Inc.* v.

United States, slip op. 9 n.16. But that line of authority does not compel the outcome that appellants seek here.

First, the decisions upon which appellants principally rely involved the award of simple interest rather than compound interest as provided in the Rail Act. Although appellants attempt to invoke the portion of the rulings that sets aside the statutory interest rate, they distort the decisions by claiming "an element which * * * [those courts] ha[ve] declined to add, namely, compound rather than simple interest." *Severance/Delay Damage Opinion*, 591 F. Supp. at 660 (J.S. App. 828). As the Special Court correctly understood (*id.* at 659-660 (J.S. App. 828-829)), appellants cannot have it both ways.

Moreover, the government demonstrated below, which showing "was not disputed by CNJ," that the simple interest approach in these decisions "would not produce delay compensation for [them] significantly higher than the 8% compound interest provided for in [the Rail Act]." *Severance/Delay Damage Opinion*, 591 F. Supp. at 659-660 (J.S. App. 828). For example, as of December 31, 1983, the simple interest methodology yields an amount of interest that is only .0274 larger than that produced by the statutory rate[25] (see Reply of the Government Parties in Support of the Proposed Final Judgment Upon the Claims of the Central Railroad Company of New Jersey, App. 1, at 1 (Jan. 19, 1984))—an amount that appellants acknowledged below was "not much more" than that provided under the Act. See Answer and Memorandum of Central Jersey Industries, Inc., in Support of Objections to Final Judgment at 28 (Jan. 5, 1984). Similarly, if the redemption date of the certificates of value is taken to be December 31, 1987 (the outside date specified in the Rail Act), the amount of interest under the simple interest approach would equal the interest under the statute only if the applicable rate of interest during the en-

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[25] That is, the difference between the amount of interest under the simple interest and the statutory approaches, divided by the statutory interest amount, equals .0274.

tire period January 1, 1984-December 31, 1987 was approximately 16%—a rate substantially in excess of anything ever allowed in any of the decisions that have followed the simple interest approach. See Reply of the Government Parties in Support of the Proposed Final Judgment, *supra*, at 27 & App. 1, at 1. Thus, none of these decisions supports an award of interest that would be substantially different from that provided by the Rail Act or compels the conclusion that the statutory interest provision is constitutionally unreasonable.[26]

In upholding the validity of the 8% compound interest rate in the Rail Act, the Special Court also correctly emphasized "the unique circumstances of this case." *Severance/Delay Damage Opinion*, 591 F. Supp. at 660 (J.S. App. 829). Congress's decision to establish this interest rate "clearly was a considered one," and it "provided a much more generous 8% compound interest rate" instead of "the time-honored 6% simple interest provision." *Id.* at 661 (J.S. App. 830). And, as appellants conceded and the Special Court found (*id.* at 656, 661, 663 (J.S. App. 821, 830, 832)), this figure was fully reasonable at the time it was adopted and no evidence was adduced to show that anyone then anticipated the subsequent rise in interest rates. Furthermore, the statutory interest provision was "an integral part of a broad Congressional plan to preserve essential railroad service in the Northeast and to enable the bankrupt railroads in that region to receive billions of dollars from the Federal Treasury in compensation for properties whose operations

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[26] Appellants also cite (J.S. 28), without further argument, two decisions that have awarded compound interest. However, as the Special Court explained, "[t]he most that CNJ can extract from [those decisions] is that compounding of interest is not improper *when the interest yield has been computed on an appropriate basis.* * * * [T]his would be either the yield on government bonds purchased at the time of the taking and maturing at the date of payment * * * or yields on short-term government obligations." *Severance/Delay Damage Opinion*, 591 F. Supp. at 660 (J.S. App. 829) (emphasis in original). The Rail Act affords appellants the first of these constitutionally permissible alternatives. *Ibid.*

were grinding to a halt." *Id.* at 661 (J.S. App. 830). Thus, "[t]his is not the ordinary case where government * * * deprives a citizen of property which he would have preferred to keep for his own use. Continued operation was the last thing the railroads wanted; they had neither the desire nor the ability to perform." *Id.* at 662 (J.S. App. 831). Especially when viewed in the context of a bail-out for distressed railroads "to cope with a national emergency of unparalleled magnitude" (*id.* at 663 (J.S. App. 832)), the interest provision in the Rail Act is not unconstitutional.

3. Finally, appellants contend (J.S. 30-32) that the costs of removing CNJ's Newark Bay Bridge constitute severance damages that are compensable under the Rail Act. The Special Court correctly rejected this claim, holding that CNJ's removal costs were not the result of the Rail Act.

The right to erect a bridge across a navigable waterway is "subject to the paramount right of navigation." *Union Bridge Co.* v. *United States*, 204 U.S. 364, 398 (1907). Under Section 4 of the Bridge Act of 1906 (33 U.S.C. 494), the Secretary of Transportation may order the alteration or removal of a bridge that becomes an obstruction to navigation "at the expense of the persons owning or operating [it]." However, in the Truman-Hobbs Act of 1940 (33 U.S.C. 511 *et seq.*), Congress provided that, with respect to bridges over navigable waters that are in use and operation for the purpose of carrying railroad traffic, the United States would pay the principal share of the cost of alteration or removal and the owner would pay only that portion equal to any benefit it accrued. Therefore, unless a bridge is engaged in rail carriage, the bridge owner is "not entitled to any compensation for the alteration or removal of the bridge as a result of navigation needs." *Southern Ry.* v. *TVA*, 294 F.2d 491, 493 (5th Cir. 1961). See *United States* v. *New York C. R.R.*, 252 F. Supp. 508 (D. Mass. 1965), aff'd, 358 F.2d 747

(1st Cir. 1966) (bridge owner was liable for removal costs after the rail line across the bridge was abandoned, notwithstanding the existence of prior plans to alter the bridge under the Truman-Hobbs Act).

Appellants do not contest these legal principles. They also do not contest that the Newark Bay Bridge had been declared an obstruction to navigation and was required to be dismantled when rail service pursuant to the State's subsidy was terminated in 1978. See *Severance/Delay Damage Opinion*, 591 F. Supp. at 668 (J.S. App. 841-842). Nor do they contest that "[t]he Bridge had long ceased to have value for rail use." *Id.* at 669 (J.S. App. 844). Thus, the conveyance of other properties under the Rail Act, which left the Bridge available for rail service as long as the State continued its subsidy, did not cause CNJ to become responsible for the cost of removal. As the Special Court summarized (*id.* at 675 (J.S. App. 854)), "the Bridge problem has been with CNJ for years and we see no sufficient basis, as a matter of fairness, let alone as a matter of constitutional requirement, for shifting to the United States the cost of removing a hindrance to navigation which was on the brink of becoming useless for rail service when the discussions leading to enactment of the Rail Act began."

Appellants contend, however, that absent the Rail Act CNJ could have managed to avoid the cost of removal. This contention is incorrect. First, the Special Court found, based on record evidence, that the Port Authority of New York and New Jersey had not in fact agreed to purchase the Bridge, and there is no basis to conclude that such a purchase would ever have taken place. See *Severance/Delay Damage Opinion*, 591 F. Supp. at 670-672 (J.S. App. 846-849). Second, the court also found that the State of New Jersey would not have purchased the Bridge as necessary to preserve rail service in the absence of the Rail Act (*id.* at 672-673 (J.S. App. 849-851)), and, alternatively, that any purchase of the Bridge in connection with the State's acquisition of appellants' other properties would have included a reduction in the

price to reflect "the benefit [the State] was thereby conferring by relieving CNJ of the burden of removing the Bridge at its own expense—a burden which CNJ would otherwise have been unable to unload. * * * [T]he Bridge was a $14 million albatross." *Id.* at 673-674 (J.S. App. 851-852).[27] The factual record supports the finding that CNJ would not have been spared the cost of removing the Bridge but for the Rail Act, and further review of this issue is plainly unwarranted.

CONCLUSION

The judgment of the Special Court should be affirmed.

Respectfully submitted.

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United States Railway Association

NOVEMBER 1984

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[27] The Special Court additionally noted that CNJ—"whether through necessity, obstinacy, or as a bargaining tactic"—had rejected proposals to remove the Bridge while it was still in rail service and thus subject to the Truman-Hobbs Act. See *Severance/Delay Damage Opinion*, 591 F. Supp. at 670 (J.S. App. 846). As the court stated (*ibid.* (J.S. App. 845)), "responsibility for delay rests rather more in CNJ than in the Coast Guard" and at all events "any injury [CNJ suffered] from the Coast Guard's delay * * * was not from any taking or failure to take under the Rail Act" and hence is not compensable here.

APPENDIX

1. Transferors of rail properties under the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. 701 *et seq.*, that settled their claims in the Special Court proceedings

Erie & Kalamazoo Railroad Company—Settlement Agreement approved March 21, 1980

Penn Central Company (formerly Penn Central Transportation Co.), and the following affiliated transferors—Settlement Agreement approved December 5, 1980

American Contract Company
Baltimore and Eastern Railroad Company
Beech Creek Railroad Company
Central Indiana Railway Company
Chicago River and Indiana Railway Company
Chicago, Kalamazoo and Saginaw Railway Company
Cleveland and Pittsburgh Railroad Company
Cleveland, Cincinnati, Chicago & St. Louis Railway Co.
Connecting Railway Company
Delaware Railroad Company
Despatch Shops, Inc.
Detroit Manufacturers' Railroad
Erie and Pittsburgh Railroad Company
Fort Wayne and Jackson Railroad Company
Hudson River Bridge Company at Albany
Indianapolis Union Railway Company
Joliet and Northern Indiana Railroad Company
Little Miami Railroad Company
Mahoning and Shenango Valley Company
Mahoning Coal Railroad Company
Manor Real Estate Company
Michigan Central Railroad Company
New York Central Railroad Development Corporation
New York Connecting Railroad Company
Northern Central Railway Company
Penndel Company

Penndiana Improvement Corporation
Pennsylvania and Atlantic Railroad Company
Pennsylvania Tunnel and Terminal Railroad Company
Peoria and Eastern Railway Company
Philadelphia and Trenton Rail Road Company
Philadelphia, Baltimore and Washington Railroad Company
Pittsburgh, Fort Wayne and Chicago Railway Company
Pittsburgh, Youngstown & Ashtabula Railway Company
Providence Produce Warehouse Company
Shamokin Valley and Pottsville Railroad Company
South Manchester Railroad Company
Union Depot Company (at Columbus, Ohio)
Union Railroad Company of Baltimore
United New Jersey Railroad and Canal Company
Waynesburg & Washington Railroad Company
Waynesburg Southern Railroad Company
West Jersey and Seashore Railroad Company

Pennsylvania-Reading Seashore Lines—Settlement Agreement approved January 26, 1981

Dayton Union Railway Company—Settlement Agreement approved February 12, 1981

Lehigh & Hudson River Railway Company—Settlement Agreement approved February 26, 1981

New York & Long Branch Railroad Company—Settlement Agreement approved February 26, 1981

Reading Company and the following affiliated transferors—Settlement Agreement approved September 2, 1981

East Pennsylvania Railroad Company
Eastern Real Estate Company
Port Reading Railroad Company
Trenton-Princeton Traction Company
Wilmington and Northern Railroad Company

Delaware & Bound Brook Railroad Company—Settlement Agreement approved October 21, 1981

Philadelphia, Germantown & Norristown Railroad and its former affiliate Plymouth Railroad Company—Settlement Agreement approved October 23, 1981

North Brookfield Railroad Company—Settlement Agreement approved January 22, 1982

North Pennsylvania Railroad Company—Settlement Agreement approved January 25, 1982

Erie Lackawanna Railway Company and the following affiliated transferors—Settlement Agreement approved January 25, 1982

Erie Land and Improvement Company
Erie Land and Improvement Company of Pennsylvania
Hoboken Ferry Company
Hudson Realty Company
Lackawanna & Wyoming Valley Railway Company
Lawroy Land Company
Rochester & Genesee Valley Railroad

Norwich & Worcester Railroad Company—Settlement Agreement approved April 19, 1982

Lehigh Valley Railroad Company and the following affiliated transferors—Settlement Agreement approved April 30, 1982

Consolidated Real Estate Company
United Real Estate Company

Ann Arbor Railroad Company—Settlement Agreement approved June 10, 1982

Niagara Junction Railway Company—Settlement Agreement approved July 7, 1982

Kalamazoo, Allegan & Grand Rapids Railroad—Settlement Agreement approved September 7, 1982

Ironton Railroad Company—Settlement Agreement approved September 24, 1982

Holyoke & Westfield Railroad Company—Settlement Agreement approved December 10, 1982

Allentown Terminal Railroad Company—Settlement Agreement approved May 27, 1983

Troy & Greenbush Railroad Association—Settlement Agreement approved July 6, 1983

Lehigh and New England Railroad Company—Settlement Agreement approved May 14, 1984

Note: The following two railroads were originally designated by the Special Court as parties to the proceedings below, under the assumption that they had transferred properties under the Rail Act. In fact, they transferred no properties and had no claims to be considered in the Special Court.

Buffalo Creek Railroad
Canton & Loudon Railway

2. Transferees of rail property under the Regional Rail Reorganization Act of 1973, as amended, in addition to Consolidated Rail Corporation

Baltimore & Ohio Railroad Company
Bessemer & Lake Erie Railroad Company
Black River & Western Corporation
Boston & Maine Corporation
Burlington Northern Inc.
Chesapeake & Ohio Railway Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Chicago & Northwestern Transportation Company
Delaware & Hudson Railway Company
Detroit & Mackinac Railway Company
Detroit, Toledo & Ironton Railroad Company
Grand Trunk Western Railroad Company
Illinois Department of Transportation

Illinois Terminal Railroad Company
Louisville & Nashville Railroad
Maryland & Pennsylvania Railroad Company
Massachusetts Bay Transportation Authority
Michigan Department of Highways & Transportation
New Hope & Ivyland Railroad
New Jersey Department of Transportation
Norfolk & Western Railway Company
Pennsylvania Department of Transportation
Pittsburgh & Lake Erie Railroad Company
Providence & Worcester Company
Southern Railway Company
Toledo Peoria & Western Railroad Company
Union Railroad Company

3. Parties granted intervention in the valuation proceedings

Institutional Investors Penn Central Group and certain Penn Central Indenture Trustees

The First National Bank of Chicago as Trustee under First Mortgage Indenture of the Chicago River and Indiana Railroad Company

Provident National Bank and A. Wakelee Swartz, Jr., as Indenture Trustees for Pennsylvania Tunnel and Terminal Railroad Company, and the Bank of New Jersey, as Indenture Trustee for New York Connecting Railroad Co.

Citibank, N.A., as Agent for the Committee of Secured Bank Creditors in the Penn Central Transportation Company Reorganization Proceedings

Richard Joyce Smith, Trustee of the Property of the New York, New Haven & Hartford R.R. Co.

Penn Central Company (owner of all of the stock of Penn Central Transportation Co., prior to reoganization of the latter)

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